Docket: 2007-1898(IT)I

BETWEEN:

JULIE OZAWAGOSH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of *Norma Petahtegoose* (2007-2395(IT)I) on April 8, 2013, at Sudbury, Ontario.

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellant:	Aaron Detlor
Counsel for the Respondent:	Tamara Watters

JUDGMENT

The appeals from the reassessments for the 1999, 2000, 2001, 2002, 2004, 2005 and 2006 taxation years made under the *Income Tax Act* are dismissed in accordance with the attached Reasons for Judgment.

Signed this 2nd day of October 2013.

« François Angers »

Angers J.

Docket: 2007-2395(IT)I

BETWEEN:

NORMA PETAHTEGOOSE,

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and

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Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellant:	Aaron Detlor
Counsel for the Respondent:	Tamara Watters

JUDGMENT

The appeals from the reassessments for the 1999, 2000 and 2001 taxation years made under the *Income Tax Act* are dismissed in accordance with the attached Reasons for Judgment.

Signed this 2nd day of October 2013.

« François Angers »

Angers J.

Citation: 2013 TCC 311
Date: 20131002
Docket: 2007-1898(IT)I

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Docket: 2007-2395(IT)I

BETWEEN:

NORMA PETAHTEGOOSE,

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and

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Respondent.

REASONS FOR JUDGMENT

Angers J.

[1] These appeals were heard on common evidence. The Minister of National Revenue (the "Minister") reassessed the appellant Julie Ozawagosh's tax liability to include in her income the following amounts earned through her employment with Native Leasing Services (NLS) in the following taxation years.

Taxation year	Income not included
1999	$22,310
2000	$38,521
2001	$38,244
2002	$20,593
2004	$27,948
2005	$16,621

[2] In addition to the above years, the appellant Julie Ozawagosh appealed her 2006 taxation year even though the Minister assessed her tax liability on the basis of her tax returns as filed. At trial, this appellant was not aware that she had appealed her 2006 taxation year. She admitted that she had not worked for NLS in 2006 and she could not recall where the income reported was earned. It is therefore impossible for me to decide whether the income earned in 2006 is exempt from taxation. The appeal of Julie Ozawagosh for her 2006 taxation year is therefore dismissed.

[3] The appellant Norma Petahtegoose is appealing her 1999, 2000 and 2001 taxation years. The Minister reassessed her tax liability to include in her income the amounts of $14,863, $27,929 and $15,402 for those years respectively, which amounts were also earned through employment with NLS.

[4] Both appellants are status Indians. They reside on and are members of the Atikameksheng Anishnawbek First Nation and both were employed by NLS during the relevant taxation years. NLS is an employment services leasing business. The appellants' services were leased to the Shkagamik-Kwe Health Centre (SHC), where they each held different positions. On the basis of their Indian status, neither appellant paid income tax on her employment income received from NLS.

[5] The issue in these appeals is whether the income earned by both appellants from their employment with NLS during the relevant taxation years was personal property of an Indian situated on a reserve, thus falling within the purview of paragraph 87(1)(*b*) of the *Indian Act* such that it would be tax exempt.

[6] In the relevant years, SHC was part of a network of ten Aboriginal Health Access Centres located throughout the province of Ontario. It is one of the only two not located on a reserve. It is situated approximately 20 kilometres away from the Atikamekshen Anishnawbek reserve. Each such centre is modelled after community health centres and is affiliated with a particular reserve. The network has now grown to over 30 centres. The SHC's letters patent and by-laws set out its objectives, which are to provide medical, health and traditional support services to First Nation

communities. The objects stated in the letters patent dated May 25, 1998 read as follows:

> (a) To establish and to operate, one or more culturally based holistic health centres dedicated to balance and healthy lifestyles in the Northeast Region of the Province of Ontario.
>
> (b) To provide medical, health and supportive services to the community with specific emphasis on the needs of the aboriginal people in the community.
>
> (c) To promote the healing and wellness of the aboriginal people in the community by providing culturally appropriate services, traditional healing programs, community health and education programs, and community outreach and development programs.

In by-law No. 1, article 5, which deals with aims and objectives, indicates that the first object of SHC is "[t]o establish and operate one or more culturally appropriate Native holistic health centres, dedicated to balanced and healthy lifestyles . . . "

Article 7 which concerns the board of directors, requires that at least 75% of directors be of Native ancestry. Article 5(*b*)(i) specifies that another of SHC's aims and objectives is "to provide medical, health and supportive services to the community with specific emphasis on the needs of the Native people in the community".

[7] These same objectives are found on the SHC website, where it is stated that SHC is dedicated to providing equal access to quality health care for all First Nations Metis and Inuit people in the city of Greater Sudbury, as well as individuals and families from partner First Nations, namely; Wahnapitae, Henvey Inlet and Magnetawan. Aboriginal people make up approximately 50% of SHC's staff. As part of the traditional health program, visiting elders speak to clients in need of guidance and counsel them, and part of its daily activities, the SHC also engages in traditional practices such as the burning of sage called smudging, which cleanses negative energy. Although clients of SHC have to fill out a questionnaire when receiving services, they do not have to show identification to prove that they belong to a First Nation. They simply self-declare. Residency is not a precondition to clients' obtaining SHC's services. It is fair to say that the services are available both to clients who reside on a reserve and to clients who do not.

Norma Petahtegoose

[8] From May 1999 until 2001, the appellant Norma Petahtegoose worked on a full-time basis at the SHC as administrative support to the medical staff. She describes herself as being the first person that clients would see when they walked into the health centre. Her duties included booking appointments, managing files and preparing patients' medical charts. She has no training as a physician or nurse and is not a traditional healer. Most of her work duties were performed on SHC's premises. In fact, she was rarely required to do work anywhere other than on SHC’s premises.

[9] Ms. Petahtegoose testified as to her difficult childhood. Born in 1967, she was adopted when she was three months old. Her adoptive parents separated when she was three years old. At six, she moved in with her older adoptive sister and finally went back to live with her adoptive mother when she was thirteen. She pursued her high school studies and completed a retail florist program at Cambrian College.

[10] She married in 1989. Her husband’s family is very mindful of their culture and practise it on a day-to-day basis. She has learned a great deal about their traditions and culture. She testified that, because of her background and life experience, she was able to better understand SHC's clients’ issues and steer them in a direction that may have been appropriate for them. She also learned a lot about her culture while working at SHC.

Julie Ozawagosh

[11] From 1998 until 2000, the appellant Julie Ozawagosh worked with the aboriginal HIV/AIDS program as an advocate-counsellor and did this work at SHC's offices. This program was part of the Ontario Aboriginal HIV/AIDS Strategy. Her role was to promote “cross-cultural awareness” with respect to HIV, which she defined as an understanding of how Anishnawbek people relate to and view the land and the issues of their people, such as drug and alcohol abuse and physical abuse. She also taught harm reduction programs and assisted HIV positive individuals and their families. Her clients were exclusively Aboriginal people living on a reserve, but her duties were performed on-reserve only around three times a year.

[12] In 2000 or thereabouts, she became the traditional coordinator for SHC and remained in that position until her retirement in May 2005. She was employed by NLS and her services were leased to SHC during the taxation years under appeal.

[13] SHC provided the appellant with an office from which she would coordinate activities and where she would meet with clients. She also arranged traditional healer and alternative health therapy services and coordinated a variety of cultural events, ceremonies and workshops, such as medicine picking, craft and language classes, and access to various support groups.

[14] The appellant Julie Ozawagosh accompanied a traditional healer and volunteered to harvest traditional medicines, which are available on- and off-reserve, for around five hours per week from April to October. She said that this took about 25% of her time. In 2005, she only spent around 5% of her time on-reserve as she retired in May of that year.

[15] The appellant acquired the knowledge to do the above through the elders and by attending conferences and spiritual gatherings. She also took an on-reserve course in band planning and economic development work offered by one Bernard Petahtegoose, an elder. Her background and life experience were also a valuable tool.

Legislation

[16] Pursuant to sections 3 and 5 of the *Income Tax Act*, a taxpayer must, in computing his or her income, account for income from all sources, including amounts received as salary, wages and other remuneration in the year. Amounts may be excluded from income if they meet the criteria set out in section 81 of the *Income Tax Act*, which reads in part as follows:

> 81. (1) Amounts not included in income -- There shall not be included in computing the income of a taxpayer for a taxation year,
>
> > (*a*) Statutory exemptions [including Indians] -- an amount that is declared to be exempt from income tax by any other enactment of Parliament, other than an amount received or receivable by an individual that is exempt by virtue of a provision contained in a tax convention or agreement with another country that has the force of law in Canada.

The relevant statutory exemption which is at issue in these appeals is found in paragraph 87(1)(*b*) of the *Indian* Ac, which reads as follows:

> 87. (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83 and section 5 of the *First Nations Fiscal and Statistical Management Act*, the following property is exempt from taxation:
>
> . . .

(*b*) the personal property of an Indian or a band situated on a reserve.

[17] It therefore follows from the above paragraph that I must decide whether the appellants' employment income was "personal property . . . situated on a reserve".

Analysis

[18] The Supreme Court of Canada held in *Nowegijick v. The Queen,* [1983] 1 S.C.R. 29, and in *Bastien Estate v. Canada*, 2011 SCC 38 [2011] 2 S.C.R. 710, that employment income is personal property for the purpose of section 87. More particularly, it said it was non-physical property. The only issue remaining here is whether it is "situated on a reserve".

[19] Several cases have acknowledged the difficulty of ascribing intangible property to a specific location for the purposes of determining whether it is situated on a reserve. Connecting factors were established by the Supreme Court of Canada in *Williams v. Canada*, [1992] 1 S.C.R. 877, to guide courts in their analysis. In *Bastien*, *supra*, the Supreme Court of Canada said that, in conducting a "connecting factors" analysis, judges must have regard to the purpose of the exemption, the type of property and the nature of the taxation of the property (see paragraphs 18, 20, 42 and 43) while keeping in mind that the question to be determined is whether the property is situated on a reserve.

[20] In *Bastien*, *supra*, the Supreme Court of Canada indicated that the purpose of section 87 is not to "remedy the economically disadvantaged position of Indians" by allowing them to acquire, hold and deal with property in the commercial mainstream on different terms than their fellow citizens nor to "confer a general economic benefit upon the Indians" (see pararagraphs 21 and 23). It is, rather, as stated by La Forest J. in *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, and restated in *Bastien*, *supra* "to insulate the property interests of Indians in their reserve lands from the intrusions and interference of the larger society so as to ensure that Indians are not dispossessed of their entitlements".

[21] In *Bastien*, *supra*, Cromwell J. for the majority made two additional comments with regard to the purposive approach. He said at paragraph 25 that while a "purposive analysis must inform the court's approach to weighing the connecting factors . . . it must be acknowledged that there may not always be a complete correspondence between the meaning of the text and its broad, underlying purpose".

[22] The second comment concerns the expression "Indian qua Indian". At paragraphs 26, 27 and 28, Cromwell J. stated that the focus should be on whether there is a connection between the property and the reserve such that it may be said that the property is situated there for the purposes of the *Indian Act*, and not on whether the "property is integral to the life of the reserve or to the preservation of the traditional way of life". He noted:

> . . . While the relationship between the property and life on the reserve may in some cases be a factor tending to strengthen or weaken the connection between the property and the reserve, the availability of the exemption does not depend on whether the property is integral to the life of the reserve or to the preservation of the traditional Indian way of life.

[23] In *Googoo v. The Queen*, 2008 TCC 589, Associate Chief Justice Rossiter, relying on *The Queen v. Monias*, 2001 FCA 239, stated the following, at paragraph 91, concerning a specific case of employment income:

> Paragraph 87(1)(*b*)'s purpose is to protect from erosion by taxation the property, such as employment income, of individual Indians which they acquire, hold and use on the reserve. Its purpose is to achieve the preservation of property held by [Indians] *qua* Indians on reserves so that their traditional way of life would not be jeopardized. It is the situs of its acquisition that is particularly important.

[24] In the present, the property said to be exempt under section 87 of the *Indian Act* is the appellants' employment income; the nature of the tax is a tax on income. The Federal Court of Appeal has said in *Canada v. Folster*, [1997]), 3 F.C. 269, *Shilling v. M.N.R.*, 2001 FCA 178, and *Bell v. Canada*, [2000] 3 C.N.L.R. 32, (2000), 256 N.R. 147, that the following factors are potentially relevant in determining whether an Indian's employment income is situated on a reserve:

- the location or residence of the employer;
- the nature, location and surrounding circumstances of the work performed by the employee;
- the nature of any benefit that accrued to the reserve from that work; and
- the residence of the employee.

[25] The weight to be assigned to any of these factors will vary according to the facts of each case.

Traditional way of life

[26] The appellants rely on the decision rendered by the Federal Court of Appeal in *Canada v. Robertson*, 2012 FCA 94, in support of an argument to the effect that the traditional way of life should be given significant weight in these appeals. In *Robertson*, the Federal Court of Appeal interpreted Cromwell J.'s comment that the protection of section 87 is not limited to income earned in the course of activities that could be characterized as "integral to the life of the reserve or to the preservation of the traditional Indian way of life" as meaning that section 87 should not be interpreted in a manner that limits the activities from which Indians may earn tax-exempt income to the past (see paragraphs 60-62). The Court further said that an activity that gives rise to income and that is important to the economic, social and cultural fabric of the reserve "is relevant to determining whether a sufficiently close connection exists between the Reserve and the source of the Appellants' income".

[27] In *Robertson*, the Court found a sufficiently close connection to exist between the reserve and fishing, the source of the taxpayers' business income, by attaching significant weight to the long history of commercial fishing in lakes near the reserve by the First Nation and their ancestors and to the continuing importance of that fishing to the economic, social, and cultural fabric of the reserve.

[28] I believe that the facts in *Robertson* can be distinguished from the facts in these appeals. The Federal Court of Appeal, in addition to giving significant weight to the long history of commercial fishing by the First Nation and their ancestors, also considered, among other things, the fact that many of the activities related to the catching of fish were located on-reserve and that the activities carried on off-reserve were nonetheless engaged in near the reserve. In addition, all the business dealings of the taxpayers were with an on-reserve cooperative, which was a critical institution in the life of the reserve. It was this latter factor that anchored the taxpayers' business income to the reserve (see paragraph 86).

[29] In our fact situation, the SHC, unlike the cooperative in *Robertson*, is not situated on a reserve nor was most of the work performed by the appellants done on a reserve. I do not believe that the evidence of an elder setting forth his views that no boundaries exist to delimit his "home" is sufficient to support a finding that the work was performed on a reserve. I have no doubt, though, having regard to the nature of the appellants' employment, that their difficult past and their life experience may, in certain circumstances, have allowed them to better understand their clients and help them deal with those clients' problems. I do not, however, believe this to be a

sufficient basis for concluding that the appellants' employment income was situated on a reserve.

Nature of appellants' employment

[30] The appellant Norma Petahtegoose worked at the SHC as administrative support to the medical staff. She was basically a receptionist. She explained that because of her background and life experience she was able to better understand SHC's clients' problems and steer them in a direction that might have been appropriate for them. However, the evidence also discloses that she has no training as a physician or nurse and is not a traditional healer. In addition, most of her work was performed on SHC's premises and she was rarely required to work at any other place.

[31] The appellant Julie Ozawagosh, on the other hand, became the traditional coordinator for SHC in 2000 and remained in that position until her retirement. In that capacity, she arranged traditional healer and alternative health therapy services and coordinated a variety of cultural events, ceremonies and workshops. She also accompanied a traditional healer and volunteered to harvest traditional medicines on different reserves and off-reserve for about five hours a week from April to October, which she said represented 25% of her time, except in 2005. She acquired the knowledge to do this work through the elders and through conferences and spiritual gatherings.

[32] In *Shilling*, *supra*, the Federal Court of Appeal held that the fact that the employment at issue involved providing social services that consisted in the delivery of programs to assist Native people off-reserve in large part through reconnecting them with their culture and traditions was no reason per se, for conferring preferred tax treatment under section 87 (see paragraphs 49-52). This was, according to the Federal Court of Appeal, in stark contrast to the situation in *Folster*, *supra*, where the hospital patients to whom the appellant provided services mostly lived on-reserve. The Federal Court of Appeal wrote at paragraph 52 of *Shilling*:

> [52] In finding that the nature of the respondent's duties are [*sic*] not a connecting factor to a reserve, we do not overlook the fact that the services provided are social services to Native people as opposed to employment in a for-profit enterprise. However, many not-for-profit social service organizations exist in Canadian cities. Employees of such organizations are not exempt from income tax. Given the limited purpose of paragraph 87(1)(*b*) of the *Indian Act*, the fact that the employment at issue involves providing social services to off-reserve Native people, is no reason for conferring preferred tax treatment under that provision.

[33] I agree with the respondent's counsel when she argues that, as laudable as the work of the appellants may have been, the provision of non-profit social services to Indians will not connect their employment income to a reserve as a physical place. That argument is particularly well-founded in the case of the appellant Norma Petahtegoose.

[34] As to the appellant Julie Ozawagosh, the nature of the work she performed could be linked to Indian traditions and culture. The services she rendered to on-and off-reserve clients at SHC were aimed at addressing issues by drawing on those traditions and that culture. In its recent decision in *Kelly v. Canada*, 2013 FCA 171, the Federal Court of Appeal considered that Mr. Kelly had "'unique qualifications, skills and experience' in the area of 'traditional strategic planning and traditional governance'". He provided services aimed at addressing "in a holistic manner the social, cultural, economic and political spheres and issues of traditional life on the reserves". Although the Court did not specify what weight was to be assigned to these facts, I should think that they would merit considerable weight. In the case of the appellant Julie Ozawagosh, the evidence is not clear as to whether SHC's clients were Indians living on a reserve. Her work was performed off-reserve, with the exception of harvesting medicines, which was done both on- and off-reserve. This makes it more difficult for me to locate her employment income on a reserve.

Location of the employer

[35] Hardly any evidence was presented regarding the identity, functions and operations of NLS other than a copy of one of the employment contracts it signed with the appellant Julie Ozawagosh, which reveals nothing of any particular value in this regard. In light of *Shilling*, *supra*, and *Horn v. Canada*, 2008 FCA 352, the location of NLS should not be given a great deal of weight. In addition, the appellant Norma Petahtegoose testified that, from the beginning of her contract, she believed that she was applying through SHC, and she stated that she did not seek the position through NLS. In my opinion, the location of NLS is of no assistance as a connecting factor.

Location of the work performed by the employee

[36] SHC is located in Sudbury, Ontario, and is not on a reserve. The appellant Norma Petahtegoose testified that most of her work duties were carried out on SHC's premises. As for the appellant Julie Ozawagosh, her testimony revealed that she spent around five hours per week from April to October, which she describes as being about 25% of her time, harvesting medicines on different reserves and off-reserve.

There is no evidence as to what portion of the harvesting was actually done on-reserve.

[37] In November 2008, the Atikameksheng Anishnawbek First Nation filed a territorial claim seeking a declaration and damages with respect to an alleged failure to properly provide reserve lands in the Greater Sudbury Region in accordance with a treaty. The claim was eventually dismissed by the Ontario Superior Court of Justice.

[38] It follows from *Folster*, *supra*, *Shilling*, *supra* and *Bell*, *supra*, that the off-reserve location of the employment is not alone conclusive. In *Shilling*, the Federal Court of Appeal said at paragraphs 49 and 50:

> [49] In this case, the respondent's place of employment was in Toronto. This is a factor that would tend to locate her employment income off-reserve. However, under the connecting factors analysis, location of employment alone will not be conclusive. Normally, regard must be had to the nature of the employment as a whole and the surrounding circumstances to determine what connection, if any, the off-reserve employment has to a reserve.
>
> [50] This is what was done in *Folster*, *supra*, where, although the employment was off-reserve, its location adjacent to the reserve, on land to be annexed by the reserve, and for a hospital whose clientele was primarily reserve Indians, was sufficient to situate the employment income on a reserve. Indeed, in *Bell*, *supra*, Létourneau J.A., at paragraph 36, subsequently stated that the nature of the employment and the circumstances surrounding it are the considerations that best indicate whether the personal property in question is within the commercial mainstream.

[39] I do not believe that the surrounding circumstances in this case are sufficient for me to conclude that the appellants' employment duties were performed on a reserve. Even if I were to allocate a portion of the appellant Julie Ozawagosh's employment income to the harvesting of medicines on reserves, the evidence is insufficient to enable me to make an appropriate determination given that some harvesting was also done off-reserve.

<u>Benefit to the reserve</u>

[40] SHC provided its services to clients who lived on different reserves and to clients who lived off-reserve. The evidence does not disclose where, in relation to a reserve, NLS carried on its activities, nor does it show what connection the appellants may have had with NLS in terms of benefit to a reserve.

[41] The Federal Court of Appeal in *Canada v. Akiwenzie*, 2003 FCA 469, clearly indicated at paragraphs 10 and 11 that, even if employment duties performed were beneficial to reserves, this still had nothing to do with the preservation of the personal property of an Indian qua Indian on such reserves.

[42] My colleagues Hershfield and Archambault in *Dugan v. The Queen*, 2011 TCC 269, and *Desnomie v. The Queen*, 1998 CanLII 255, subsequently affirmed by the Federal Court of Appeal, 2000 DTC 6250, have explained that even if an employee's work may help to maintain and enhance the quality of life on a reserve for the Indians living there, that does not necessarily connect the employee's entitlement to, or use of, the employment income to that reserve as a physical location. The erosion of the entitlement of an Indian qua Indian on a reserve has to be determined by reference to the person whose income is involved and not by reference to the different reserves that are benefiting directly or indirectly from the services of that person. Hence, I believe this factor should not be given much weight.

Residency

[43] In the cases referred to above, residency was included as a potentially relevant factor for determining the location of employment income for the purposes of section 87, although it is not one that would generally be given much weight (see *Folster, supra* and *Bell*, *supra*). In *Kelly v. Canada, supra*, the Federal Court of Appeal, at paragraph 52, said that the wording of section 87 commands us to ask not whether the owner of the property is situated on a reserve, but whether the property is situated on a reserve.

[44] In our fact situation, both appellants lived on a reserve, but the evidence adduced does not indicate that the activities related to the appellants' employment took place on-reserve, except for the harvesting of medicines by the appellant Julie Ozawagosh, and this activity was not limited to her own reserve. The appellants' employment income was not generated by their on-reserve activities and that makes it difficult to locate their employment income on a reserve.

Conclusion

[45] Although there are factors that favour the appellants' position, I am not convinced that there is a strong enough nexus between the appellants' employment income and a reserve to enable me to conclude that its *situs* was on a reserve. Their employment income is therefore not exempt from taxation. The appeals are dismissed without costs.

Signed this 2nd day of October 2013.

« François Angers »

Angers J.

CITATION:	2013 TCC 311
COURT FILE NOS:	2007-1898(IT)I; 2007-2395(IT)I
STYLES OF CAUSE:	Julie Ozawagosh v. Her Majesty the Queen Norma Petahtegoose v. Her Majesty the Queen
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APPEARANCES:

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